(12)

Office-Supreme Court, U.S.
FILED
FEB 21 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-320

In the Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL FARMERS UNION INSURANCE COMPANIES, ET AL., PETITIONERS

v.

CROW TRIBE OF INDIANS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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27 pp

QUESTIONS PRESENTED

1. Whether a federal court may enjoin Indian tribal court proceedings against a non-Indian on the ground that the tribal court has exceeded its jurisdiction.

2. Whether an Indian tribal court may exercise civil jurisdiction over non-Indians to redress personal injuries to a tribal member allegedly caused by the negligent maintenance of a dangerous condition on State-owned land within the Reservation where a large number of Indian children attend school.

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INTEREST OF THE UNITED STATES

The United States has long been committed to furthering the goal of self-government and self-determination for Indian Tribes. See, *e.g.*, *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 143-144 & n.10 (1980); President's Statement on Indian Policy, 19 Weekly Comp. Pres. Doc. 98 (Jan. 24, 1983). One aspect of that responsibility is to encourage respect for tribal institutions, including the tribal courts. Hence, participation of the United States in cases of this kind at least since *Williams* v. *Lee*, 358 U.S. 217 (1959). So here: we deem it appropriate to present our views on the question of tribal jurisdiction over activities within a Reservation that significantly affect the welfare of tribal members.

STATEMENT

In May 1982, a Crow Indian child, Leroy Sage, was struck by a motorcycle on the grounds of the Lodge Grass Elementary School within the Crow Reservation in Montana. The school is situated on State-owned Reservation land and its student body is 85% Crow Indian. Sage, through his guardian, filed suit against Lodge Grass School District No. 27 in Crow Tribal Court alleging that his injuries were caused by the negligent conduct of the school, specifically, the unsafe condition of the school parking lot and inadequate supervision during school hours. Process was served on the school board chairman, who failed to notify anyone else of the summons. The school district did not answer or appear and, in due course, on October 19, 1982, the tribal court entered a default judgment for $153,000 against the school district. Pet. App. 2a-3a, 15a-16a.

On November 2, 1982, having received notice of this judgment, the school district and its insurance company filed suit in federal district court alleging that the tribal court lacked subject matter jurisdiction over the controversy. Accepting that argument, the district court permanently enjoined enforcement of the tribal court order. Pet. App. 14a-27a. The Court of Appeals for the Ninth Circuit reversed, holding that a federal court could not enjoin the tribal court proceeding. Pet. App. 1a-7a. Judge Wright concurred in the result on the ground that the district court should not have intervened before requiring the plaintiffs to exhaust their tribal court remedies. Pet. App. 8a-13a.

Shortly after the court of appeals' decision, on August 1, 1984, the Crow Tribal Court issued a writ of execution pursuant to which certain property of

the school district was seized. Sale of the property was scheduled for August 23. On August 22, the school district appeared in the tribal court, seeking to enjoin the sale and to set aside the default judgment. The court, in orders dated August 22 and August 23, postponed the sale, and set a hearing to consider the school district's motion to set aside the default judgment. Br. in Opp. App. 1a-9a.

The school district also applied to Justice Rehnquist for a stay of the Ninth Circuit's mandate. Justice Rehnquist issued a temporary stay on August 21 and continued the stay on September 10. Reply Br. App. 1a-8a. On September 19, the tribal court entered an order postponing a ruling upon the motion to set aside the default judgment until after final review of the federal court proceedings by this Court. Br. in Opp. App. 10a-15a.

SUMMARY OF ARGUMENT

The District Court in this case held, first, that it could entertain a complaint against the exercise of power by the Crow Tribal Court allegedly outside its jurisdiction, and, second, that the latter court wholly lacked subject matter jurisdiction to entertain a personal injury claim by a Crow child against a State school district with respect to conduct occurring on State-owned land within the Indian Reservation. We believe the first ruling was correct, but the second erroneous.

I

Undeniably, the sovereign powers of Indian Tribes over non-Indians have been circumscribed by the reality of their "dependent status," even when no specific provision of treaty or statute expressly so stipulates. Such limitations on tribal sovereignty are nec-

essarily the consequence of federal law and it follows that anyone claiming immunity from tribal jurisdiction on this basis is asserting a federal right within the competence of the federal courts to adjudicate. Unlike an allegation of violation of the Indian Civil Rights Act, for which an apparently exclusive remedy has been provided, there is no reason to deny the availability of injunctive relief to a non-Indian whose complaint is that the tribal court is acting wholly beyond its jurisdiction.

Of course, federal courts should not always exercise their equitable jurisdiction at the earliest opportunity, especially when an adequate remedy may be available in another tribunal. Thus, here, even if intervention otherwise had been justified, it might have been appropriate for the district court to require petitioners first to seek relief in the tribal court system. But, in our view, that question is mooted because the facts presented to the federal court disclosed a case properly within tribal jurisdiction. In the present context, there is no occasion to decide under what circumstances, if any, a federal court may collaterally review tribal court judgments on grounds other than the subject matter jurisdiction of the tribal court.

II

Our submission in support of tribal court jurisdiction is limited to circumstances like those alleged here. This Court repeatedly has stressed the residual sovereignty of Indian Tribes and the governmental authority they enjoy over their diminished territory, including, in some cases, the activities of non-Indians on "fee" parcels within the Reservation. When such activities significantly affect tribal members, they are subject to regulation and taxation by the Tribe.

There is no reason to view differently the exercise of civil jurisdiction by the tribal judiciary in like circumstances. Montana has apparently waived any sovereign immunity it might possess and the hazardous situation described in the present complaint, potentially endangering a significant portion of the Tribe's younger membership, justified the tribal court's acceptance of the case. Accordingly, those proceedings ought to be permitted to go forward without federal court interference, at least at this stage.

ARGUMENT

I. THE FEDERAL COURT MAY EXERCISE ITS INJUNCTIVE POWERS TO KEEP THE TRIBAL COURT WITHIN ITS PROPER BOUNDS

We are unable to endorse the holding of the majority of the court of appeals that federal courts lack power to intervene when a tribal court acts beyond its jurisdiction. On the contrary, we share the objections to such a rule stated by Judge Wright in his concurring opinion below (Pet. App. 8a-13a), by Justice Rehnquist in his opinion accompanying the stay orders (Pet. Reply Br. App. 1a-8a), and by petitioners here. In our view, because the boundaries of tribal jurisdiction are defined by federal law, a non-Indian claiming injury from tribal "jurisdictional excesses" states a "federal question" case under Section 1331 of the Judicial Code, and the appropriate United States District Court may entertain the complaint, and, if the facts warrant it, enjoin further proceedings in the tribal court. We now urge affirmance of the judgment vacating the federal court injunction because we believe the circumstances alleged show, on balance, that the tribal court did *not* exceed its jurisdiction. But we have no doubt that

the district court was correct in entertaining the question, albeit we submit it reached the wrong conclusion on the merits.

1. It is clear enough that Indian Tribes lost some of their aboriginal sovereignty when they were brought under the dominion of the United States and assumed a "dependent status." *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 206, 209-210 (1978); *United States* v. *Wheeler*, 435 U.S. 313, 323, 326 (1978). At least in the eye of the law, that consequence resulted from federal action, since the national sovereign alone has power to diminish tribal independence. *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 147 (1982); *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153-154 (1980); *United States* v. *Wheeler*, 435 U.S. at 323. Accordingly, all limitations on tribal powers necessarily derive from federal law—whether in the form of constitutional principles, treaties and statutes, or "rudimentary propositions" of "Indian law." See *Oliphant*, 435 U.S. at 206; *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 670 (1974). And those who invoke these limitations as affording immunity from tribal jurisdiction are claiming a federal right and stating a "federal question" case under Section 1331 of the Judicial Code. Cf. *Oneida*, 414 U.S. at 667-678; *Lawrence Co.* v. *Lead-Deadwood School Dist.*, No. 83-240 (Jan. 9, 1985), slip op. 3-4 n.6.

2. In this context, we see no obstacle to conceding a private right of action in the non-Indian who alleges that he is improperly subjected to tribal court jurisdiction. Unlike the situation under the Indian Civil Rights Act, here Congress has not implicitly restricted the remedy. Compare *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978). In a case like this

one, where the allegation is that the Tribe is acting wholly outside its jurisdiction, there is no reason to deny the availability of injunctive relief in a federal court at the instance of a suitor claiming injury from tribal "jurisdictional excess."

As the court of appeals recognized, this has been the prevailing view when an Indian Tribe is alleged to have overstepped applicable boundaries through legislation or regulation. Pet. App. 5a-6a. Like petitioner, we cannot appreciate why the same rule should not govern when the claim is that a tribal *court*, instead of a tribal council, has exceeded its jurisdiction. The federal court's power is no less because the Tribe is acting judicially rather than through legislation.

3. Of course, a federal court's exercise of its injunctive power is circumscribed by traditional equitable limitations. For instance, injunctive relief may be withheld if the plaintiff has an "adequate remedy at law." In the present case, the petitioners could have contested tribal court jurisdiction, at the outset, in the tribal court. The availability of a tribal court remedy perhaps should have cautioned the district court to withhold federal injunctive relief. So, also, this Court may wish to defer decision as to the scope of the tribal court's jurisdiction, since that issue was not passed upon by the court of appeals and is pending before the tribal court. On the other hand, we believe the facts presented to the district court indicate a case within tribal court jurisdiction, and, of course, if that is correct, the federal court had no ground for intervening, at least at this stage.[1]

[1] We believe it is premature to discuss the circumstances, if any, that would justify a federal court in reviewing tribal court proceedings for procedural regularity or the legality of

II. THE TRIBAL COURT HAS JURISDICTION TO ENTERTAIN THE UNDERLYING CONTROVERSY

In our view, the ultimate question—whether the tribal court permissibly exercised jurisdiction over the tort claim alleged—is not without difficulty, particularly in light of the limited record before this Court. Nevertheless, if the issue is deemed ripe for decision, we suggest an affirmative answer. In reaching that conclusion, we eschew both extreme positions. We cannot endorse the proposition that every incident occurring within an Indian Reservation is, for that reason alone, subject to tribal jurisdiction. At the same time, we think it clear that tribal courts may adjudicate some Reservation-based claims asserted against non-Indians. Our submission is simply that the present case falls within this relatively narrow category.

1. It is useful, at the outset, to lay to rest any invitation to re-open the venerable debate whether the surviving Indian Tribes, within their diminished Reservations, are merely "private, voluntary organizations," or, rather, should be recognized as "unique aggregations possessing attributes of sovereignty over both their members and their territory." *E.g.*, *United States* v. *Mazurie*, 419 U.S. 544, 557 (1975). Of course, everyone concedes the authority of Tribes to determine their membership, to regulate, assess and discipline members, and to control the use of tribal

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particular means of executing a tribal court judgment. We merely suggest that principles of comity may well counsel a tribal court to follow state law with respect to the immunity of governmental property from seizure. *E.g.*, Mont. Code Ann. § 2-9-318 (1983). Here, we have every reason to anticipate that the ultimate judgment of the Crow Tribal Court, if its jurisdiction is vindicated by the decision of this Court, will be satisfied without putting that proposition to the test.

land. But those are the prerogatives of every private association. To read this Court's decisions as saying nothing more is to trivialize them. From *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832), through *New Mexico* v. *Mescalero Apache Tribe*, No. 82-331 (June 13, 1983), slip. op. 8-9, 11-12, the Court has emphasized that Indian Tribes constitute "*political* communities," enjoying substantial "*sovereign*" powers over both members and nonmembers when within Reservation boundaries. Looking only to the last 25 years, that point has been made no less than a dozen times. See *Williams* v. *Lee*, 358 U.S. 217, 223 (1959); *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U.S. 685, 690-692 (1965); *Kennerly* v. *District Court*, 400 U.S. 423, 426-427 (1971); *United States* v. *Mazurie*, 419 U.S. at 557-558; *United States* v. *Antelope*, 430 U.S. 641, 645 (1977); *United States* v. *Wheeler*, 435 U.S. at 323; *Santa Clara Pueblo* v. *Martinez*, 436 U.S. at 55-56; *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. at 152-154; *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 142, 151 (1980); *Montana* v. *United States*, 450 U.S. 544, 565-566 (1981); *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. at 140, 146-148; *Ramah Navajo School Board, Inc.* v. *Bureau of Revenue*, 458 U.S. 832, 837-838 (1982); *New Mexico* v. *Mescalero Apache Tribe*, slip op. 8-12.

Accordingly, we take it as settled that some non-Indians, in some circumstances, are subject to some kinds of tribal jurisdiction. Recognition of that reality, it is true, does not immediately resolve the case before us. There are limits to the power of Indian Tribes over non-Indians, and the question is whether the Crow Tribal Court's exercise of jurisdic-

tion here transgresses any such bounds. To find the answer, we must examine several potential objections peculiar to the circumstances of this case.

2. Because the underlying tort claim is directed against Lodge Grass School District No. 27, a "political subdivision" of Montana (see Mont. Code Ann. § 2-9-101(5) (1983)), troubling questions concerning state sovereign immunity are implicated. In the circumstances of this case, however, we believe no insurmountable barrier exists.

It is not clear whether a state would in any event retain its sovereign immunity from suit in tribal courts. But, in our view, that question need not be reached in this case because Montana has waived its immunity from tribal court suits. In 1972, the State amended its constitution to provide that "[t]he state * * * and all * * * local governmental entities shall have no immunity from suit for injury to a person or property * * *." Mont. Const. Art. II, § 18. This broad and unqualified waiver is remarkable. Shortly after its passage, one commentator noted,

> This bold constitutional step places Montana in a situation which is unique among the fifty states. Only this jurisdiction has moved to abolish the doctrine of sovereign immunity, *without limitation*, by constitutional fiat.

Comment, *The Passing of Sovereign Immunity in Montana: The King is Dead*, 34 Mont. L. Rev. 283 (1973) (emphasis in original). Two years later, the State constitution was amended to permit exceptions to the waiver of sovereign immunity, but only "as may be *specifically* provided by a 2/3 vote of each house of the legislature." Mont. Const. Art. II, § 18 (1974) (emphasis added). No such law addressed to tribal

court suits having been enacted, it is reasonable to take Montana at its word and construe its constitutional and statutory waiver of immunity (Mont. Code Ann. § 2-9-102 (1983)) as encompassing actions filed in tribal court.[2]

Our conclusion is the more easily justified because a local school district is involved. Unlike arms of the central state government, school districts, defined by state law as "political subdivisions," are not entitled to sovereign immunity under the Eleventh Amendment. See *Mt. Healthy City School District* v. *Doyle*, 429 U.S. 274, 280 (1977).[3] Indeed, even before the constitutional waiver of sovereign immunity in 1972, the Montana Supreme Court concluded that school districts were amenable to suit to the limits of their liability insurance. See *Longpre* v. *Joint School Dist. No. 2*, 151 Mont. 345, 443 P.2d 1 (1968). Accordingly, it is not surprising that sovereign immunity from suit was not a ground relied upon by the district court and is only mentioned in a half-hearted way both by the petitioners (Pet. Br. 20-22) and by the State of Montana itself (Eleven Amicus Curiae States Br. 35-36 & n.8).

For much the same reason, the claim of exemption likewise fails if stated more expansively as an

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[2] Petitioners' citation to Mont. Code Ann. § 2-9-311 (1983) as giving Montana's state courts "exclusive" jurisdiction of tort actions against state agencies (Pet. 21) is misleading. The provision merely confers jurisdiction—without any suggestion that the grant is exclusive.

[3] This alone distinguishes the Ninth Circuit ruling in *Montana* v. *Peretti*, 661 F.2d 756 (1981), that Montana's waiver of sovereign immunity is not sufficiently explicit to overcome the barrier of the Eleventh Amendment in federal courts. See *Pennhurst State School & Hospital* v. *Halderman*, No. 81-2101 (Jan. 23, 1984).

assertion that the State and its instrumentalities are altogether beyond tribal jurisdiction, whether exercised through courts or other organs of government. The Lodge Grass Elementary School is in no sense an involuntary hostage on the Reservation. So far as we are aware, Montana's taking up the grant of Sections 16 and 36 within the Crow Reservation carried with it no obligation to establish schools there, and, in any event, nothing compelled the State to seek or accept the offer.[4] In these circumstances, it seems appropriate to hold that State agents relinquish their special status when they enter an Indian Reservation and their conduct there directly affects the welfare of the Tribe. Cf. *United States* v. *Mission Golf Course, Inc.*, 548 F. Supp. 1177 (D.S.D. 1982), aff'd, 716 F.2d 907 (8th Cir. 1983), cert. denied, No. 83-606 (Jan. 9, 1984).

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[4] We assume, without independent knowledge, that petitioners are correct in asserting (Pet. Br. 3-4, 20) that the land in question was acquired by the State pursuant to Section 16 of the Crow Allotment Act of 1920, ch. 224, 41 Stat. 756, which tendered to the State the traditional "school sections" within the Crow Reservation (see Pet. App. 19a n.2)—albeit the Reservation had been established by treaty in 1868, long before Montana achieved statehood. See *Montana* v. *United States*, 450 U.S. at 548, 553-554, 558-559. In return, Montana promised to permit Crow Indian children "to attend the public schools of said state on the same conditions as the children of white citizens of said state." *Ibid.* Nothing in this proviso directly required the State to maintain a school on each—or any—Sections 16 and 36 within the Crow Reservation. On its face, the undertaking is no more than what the Equal Protection Clause of the Fourteenth Amendment in any event mandated, at least after the Crow became State citizens in 1924. See 8 U.S.C. (1976 ed.) 1401(a)(2). But, however that may be, it is perfectly clear that federal law did not compel Montana to enter the Crow Reservation by taking up the option to acquire one or more Sections 16 and 36.

3. Plainly, the situs of the tort on non-Indian land cannot be dispositive. As the Court has stressed, Indian Tribes are not mere landowners: they wield *governmental* powers. *Merrion*, 455 U.S. at 137-141, 145-149. There is, to be sure, a geographic limitation on tribal jurisdiction—at least when asserted over nonmembers. But that boundary is the perimeter of the *Reservation*, not the plot line of each "fee" parcel within it. That is one reason why it matters whether alienated tracts or portions of a Reservation opened up to entry by homesteaders remain "Indian country." See *Seymour* v. *Superintendent*, 368 U.S. 351 (1962); *Mattz* v. *Arnett*, 412 U.S. 481 (1973); *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975); *Solem* v. *Bartlett*, No. 82-1253 (Feb. 22, 1984), slip op. 2 nn.1&2, 4. It is, moreover, what the Court expressly said in *Montana* v. *United States*, 450 U.S. at 565 (citations omitted):

> * * * Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. * * * A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. * * *

4. Nor do non-Indians enjoy a unique immunity from the Tribe's *judicial* arm. Just as petitioners insist (correctly, we think) that *federal* jurisdiction

to correct tribal "jurisdictional excesses" does not depend upon whether the Tribe is acting judicially or legislatively, so we assert that *tribal* jurisdiction is no less when exercised judicially instead of legislatively. It is no answer that Indian Tribes cannot criminally prosecute non-Indians for offenses committed on the Reservation, even crimes against members occurring on tribal lands. *Oliphant* v. *Suquamish Indian Tribe*, *supra*. A sufficient reason for that rule is not peculiar to the Indian tribunal: The non-Indian is simply not subject to substantive tribal criminal law. See *Colville*, 447 U.S. at 153.

Our history of Indian affairs indicates that the absence of tribal criminal jurisdiction over non-Indians is no basis for disabling Indian Tribes from exercising civil jurisdiction over non-Indians. Indeed, as *Oliphant* itself stresses, national policy, evidenced in federal legislation from the Trade and Intercourse Act of 1790 to the Major Crimes Act of 1885 and a long line of treaty provisions, has subjected non-Indians committing offenses against tribal members to *federal* criminal law, administered by the *federal* courts. 435 U.S. at 198-203. And this, the Court concluded, reflected the "commonly shared presumption of Congress, the Executive Branch, and lower federal courts that tribal courts do not have the power to try non-Indians." *Id.* at 206. But there is nothing comparable on the civil side. Except for a brief and unusual transitional period in the Indian Territory (note 6, *infra*), no treaty nor statute has ever provided for federal adjudication of Reservation-based civil cases involving non-Indians.[5] On the contrary,

[5] We do not accept the contrary implication sought to be drawn from Article 1 of the Second Treaty of Fort Laramie, May 7, 1868, 15 Stat. 649, by the State of Washington as amicus curiae (Br. 8-10). The cited provision deals only with *criminal* offenses and, incidentally, obligates the United States to make whole the Indian victim of a non-Indian crime. Obviously, this does not remotely speak to the jurisdiction of the Tribe to exercise civil jurisdiction over non-Indians in a non-criminal context. Indeed, Washington's argument is foreclosed by this Court's ruling in *Williams* v. *Lee*, *supra*, which sustained tribal court jurisdiction over a non-Indian doing business on the Reservation in the face of an identical provision in the Treaty with the Navajos, June 1, 1868, Art. 1, 15 Stat. 667.

the different rule applicable in respect of tribal assertions of civil jurisdiction was expressly noted as early in 1855 in an Opinion of the Attorney General cited by this Court in *Oliphant*. 7 Op. Att'y Gen. 174, cited, 435 U.S. at 199.

Thus, once it is recognized that Tribes "retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations," *Montana*, 450 U.S. at 565, there is no reason to exclude the jurisdiction of the tribal courts in cases where substantive tribal law governs non-Indians. As Felix Cohen has summarized the matter, "the judicial powers of the tribe are coextensive with its legislative or executive powers." Cohen, *Handbook of Federal Indian Law* 145 (1942). Accord, *Powers of Indian Tribes*, 55 Interior Dec. 14, 56 (1934). It would be strange, indeed, if, in a given instance, a non-Indian were subject to tribal taxation or regulation, but could not be made answerable in tribal court to assure compliance with the relevant ordinance.[6]

[6] That awkward circumstance did prevail, for a short time, in the Indian Territory after Congress first restricted the exclusive jurisdiction of the tribal courts of the Five Civilized Tribes to cases in which members were "the sole parties" (Act of May 2, 1890, ch. 182, §§ 30, 31, 26 Stat. 94), and, eight years later, abolished those tribunals altogether (Act of June 28, 1898, ch. 517, § 28, 30 Stat. 504). See Cohen, *supra*,

5. We must not be misled because there is little record, until recently, of Indian tribunals exercising civil jurisdiction over non-Indian defendants. Except for the Five Civilized Tribes whose institutions were soon severely curtailed, the fact is that judicial tribunals, in the white man's sense, were largely unknown in the traditional Indian world. They were first introduced into Indian country as "courts of Indian offenses," effectively agencies of federal police administration with limited jurisdiction. *United States* v. *Clapox*, 35 F. 575 (D. Or. 1888). See D. Getches, et al., *Cases and Materials on Federal Indian Law* 313-317 (1979); R. Strickland, et al., *Felix S. Cohen's Handbook of Federal Indian Law* 333-334 (1982). And where genuine tribal courts ultimately developed, they suffered other set-backs. As one recent study concludes (National American Indian Court Judges Association, *Indian Courts and the Future* 13 (1978)):

> Overall, Indian courts have been retarded by their history. They originally were vehicles of an outside force. Later, their intended growth as

at 363 n.29, 430. Enforcement of tribal taxes due by non-Indians thereafter depended on the Interior Department for the brief period until taxing power was itself terminated in 1906 (Act of Apr. 26, 1906, ch. 1876, § 1, 34 Stat. 137). See, *e.g.*, *Morris* v. *Hitchcock*, 194 U.S. 384 (1904). But this exceptional situation, created by special legislation aimed at particular Tribes, indicates what otherwise would be the rule: civil judicial power reaching non-Indians to the same extent as the Tribe's legislation may. Before the Act of May 2, 1890, the civil jurisdiction of the Cherokee courts expressly covered not only cases in which members were the only parties, but also "where the cause of action shall arise in the Cherokee nation." Treaty of July 19, 1866, art. 13, 14 Stat. 803. See *In re Mayfield*, 141 U.S. 107, 113-115 (1891); *Alberty* v. *United States*, 162 U.S. 499, 502-503 (1896).

> integral parts of an Indian government was stunted by a lack of effective programs or funding, as well as policy vacillations. * * *

Today, however, the situation is very different. One survey indicated that no less than 66 Tribes expressly assert civil court jurisdiction over non-Indians in some circumstances. NAICJA Report, *Native American Tribal Court Profiles, 1984*, at 4, 5, 6, 7, 10, 11, 14, 15, 19, 21, 22, 23, 25, 30, 32, 40, 42, 44, 51, 53, 54, 56, 57, 62, 66, 70, 73, 76, 78, 80, 81, 82, 85, 86, 87, 88, 89, 90, 91, 92, 96, 97, 98, 100, 101, 104, 105, 106, 107, 110, 112, 113, 114, 115, 118, 119, 121, 124, 125, 126, 127, 128, 134, 136, 137, 143. The Department of the Interior has approved such provisions[7] and, at least in some contexts, so have the courts. *E.g.*, *Cowan* v. *Rosebud Sioux Tribe*, 404 F. Supp. 1338 (D.S.D. 1975); *Cardin* v. *De La Cruz*, 671 F.2d 363 (9th Cir. 1982), cert. denied, 459 U.S. 967; *Babbitt Ford, Inc.* v. *Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983), cert. denied, No. 83-610 (Apr. 2, 1984). Indeed, this Court's ruling in *Williams* v. *Lee*, *supra*, and its progeny strongly indicates that a non-Indian whose conduct directly affects tribal members may be

[7] Among tribal laws approved in the last decade by the Department which assert tribal court civil jurisdiction over non-Indians are constitutions, codes or ordinances of the Pueblo of Laguna, the Yerington Paiute Tribe, the Ute Tribe, the White Mountain Apache Tribe, the Gila River Indian Community, the Keweenaw Bay Indian Community, the Bay Mills Chippewa Tribe, the Confederated Tribes of the Warm Springs Reservation, the Makah Tribe, the Port Gamble Klallam Tribe, the Quileute Tribe, the Nez Perce Tribe, the Mescalero Apache Tribe, the Rosebud Sioux Tribe, the Crow Creek Tribe, the Fort Peck Assiniboine and Sioux Tribes, the Fort Belnap Gros Ventre and Assiniboine Tribe, the Salt River Pima and Maricopa Tribes and the Devils Lake Sioux Tribe.

required to answer in tribal court in respect of a Reservation-based civil claim. After all, it would be anomalous to excuse non-members from appearing in tribal court when the same persons, as plaintiffs, are compelled to invoke that tribunal to seek judicial redress.[8] That appears to be the Court's teaching in stating, without distinction between plaintiff and defendant, that "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. at 65 (footnote omitted).[9]

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[8] Of course, this symmetry cannot be extended to *in personam* jurisdiction. A defendant can object, on Due Process grounds, to a plaintiff's choice of a state forum if requisite "minimum contacts" are lacking, notwithstanding the forum's power, in the abstract, to adjudicate the claim. *E.g., Helicopteros Nacionales de Colombia* v. *Hall*, No. 82-1127 (Apr. 24, 1984); *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980). We assume that similar limitations apply to tribal forums. But there is no assertion in this case that the relationship between the defendant, the forum, and the litigation is so tenuous that tribal court jurisdiction would offend "traditional notions of fair play and substantial justice." *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945).

[9] Indeed, the district court below recognized the contradiction and sought to avoid it by suggesting that *Williams* v. *Lee* effectively has been overruled by *Montana* v. *United States*. Pet. App. 23a-24a. As this Court well knows, that is hardly the case. See, *e.g., Three Affiliated Tribes* v. *Wold Engineering*, No. 82-629 (May 29, 1984), slip op. 8-9. If anything, it is the *Montana* decision that has been narrowed. See, *e.g., New Mexico* v. *Mescalero Apache Tribe*, slip op. 7 n.12.

6. We find particularly strained the suggestion that the dictum from the *Montana* case just quoted permits tribal exercise of jurisdiction over non-Indians on the Reservation when the conduct in question directly affects the "health or welfare" of the *Tribe* itself, but denies jurisdiction when the *members* are adversely affected. One need only posit a case of tortious damage to tribal property—instead of personal injury to a member—and ask whether the non-Indian tortfeasor would then be answerable in tribal court. Surely, a rampant public nuisance located on the Reservation is not less subject to tribal jurisdiction because the resulting harm is to the tribal population rather than the tribal land. Cf. *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 179, 180-181 (1973).

It may be debatable whether tribal courts can compel a non-Indian motorist travelling through the Reservation to answer for an isolated tort affecting only a single individual who happens to be an Indian. But there is no basis for denying the Tribe and its institutions power to deal with a situation like that alleged here—maintaining a dangerous condition that potentially threatens the entire student body of a Reservation school, 85% of whom are tribal members. The standard, we submit, is whether the conduct underlying the lawsuit significantly affects the tribal community. On the face of the complaint here, this is such a case.

CONCLUSION

The judgment of the court of appeals vacating the injunction entered by the district court should be affirmed.

Respectfully submitted.

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FEBRUARY 1985

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 461531 10171